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No. 03-8661

In the Supreme Court of the United States

MELVIN T. SMITH, PETITIONER

v.

MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling, made at the close of the prosecution's case, that the evidence is insufficient as a matter of law to sustain a conviction.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling, made at the close of the prosecution's case, that the evidence is insufficient as a matter of law to sustain a conviction. Because the Federal Rules of Criminal Procedure provide for the filing of a motion for judgment of acquittal after the government closes its evidence, Fed. R. Crim. P. 29(a), the question presented in this case arises in federal criminal trials. See, *e.g.*, *United States* v. *Baggett*, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002); *United States* v. *Byrne*, 203 F.3d 671 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88 (2d Cir.), cert. denied, 528 U.S. 982 (1999) and 528 U.S. 1094 (2000). The United States therefore has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. In 1996, petitioner's girlfriend and co-defendant, Felicia Brown, lived with her family in a three-story building in Boston, Massachusetts. The family occupied the third floor of the building and part of the second floor, and rented the remainder of the second floor and the first floor to tenants. *Commonwealth* v. *Smith*, 788 N.E.2d 977, 980 (Mass. App. Ct. 2003).

On August 16, 1996, at 4:00 A.M., Brown's cousin, Christopher Robinson, descended the stairs from the third floor of the building to the second floor, intending to lie down. Robinson testified at trial that, as he reached the bottom of the stairs, he saw petitioner and Brown in Brown's bedroom. Petitioner shot Robinson three times with what appeared to be a .32 or .38 caliber pistol. Petitioner then said to Brown, "let's go." Robinson said to petitioner, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin." The shooting caused Robinson severe injuries and destroyed his digestive tract. While in the hospital, Robinson identified petitioner from a photographic array, and he later identified petitioner at trial. *Smith*, 788 N.E.2d at 980-981.

2. Petitioner was charged with unlawful possession of a firearm, assault with intent to murder, and assault and battery by means of a dangerous weapon. *Smith*, 788 N.E.2d at 980. Brown was tried jointly with

petitioner on a charge of being an accessory after the fact.

a. The charge of unlawful possession of a firearm required the Commonwealth to prove that the barrel of the firearm was less than 16 inches in length. See J.A. 107 n.1. At trial, the Commonwealth's case included testimony by Robinson that he was familiar with handguns and that the gun used by petitioner was a "pistol" that "appeared to be a .32 or a .38." J.A. 12-14; see J.A. 16-17. At the close of the Commonwealth's case, petitioner moved the trial court to enter a finding of not guilty on the firearm charge. J.A. 98-101. Petitioner argued, *inter alia*, that the Commonwealth had "not presented any evidence that the barrel of the firearm was less than sixteen inches." J.A. 98.

The trial court considered the motion in a colloquy with counsel outside the presence of the jury. J.A. 20-22. The Commonwealth argued that the jury could infer that the length of the barrel was less than 16 inches from the testimony by Robinson to the effect that the firearm was a pistol. J.A. 21. The court disagreed, stating, "I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less." *Ibid.* The Commonwealth responded that, if that were the court's interpretation, the Commonwealth would "be requesting to reopen and allow Mr. Robinson to testify to that." J.A. 22. The court ruled, however, that "this is the time in which they are moving for a required finding of not guilty," and "I'm going to allow it on the firearm charge." *Ibid.* The court's allowance of the motion was recorded on the trial docket and was attested on the motion, but it was not communicated to the jury. *Smith*, 788 N.E.2d at 981; Pet. App. 10a.

The trial then continued with presentation of the defense case on the remaining charges against petitioner and Brown. Those proceedings were completed the same morning. Petitioner presented no witnesses, but Brown called her mother to testify, and petitioner's counsel briefly cross-examined Brown's mother. J.A. 56-58. Petitioner and Brown rested their cases following the testimony of Brown's mother, and the jurors were excused for their morning recess. J.A. 58-59. After discussing the jury instructions with counsel, the court ordered a 15-minute recess. J.A. 71.

Before the proceedings resumed, the Commonwealth's attorney alerted the court to a decision by the Massachusetts Supreme Judicial Court, *Commonwealth* v. *Sperrazza*, 363 N.E.2d 673 (1977), which had held that jurors could conclude from testimony that a firearm was a pistol or revolver that the barrel length was less than 16 inches. J.A. 71-72. The court discussed the decision with counsel in a side-bar conference upon resumption of the proceedings. J.A. 71-74. The Commonwealth suggested that the court could submit the firearm charge to the jury and reserve a final decision on whether to grant petitioner's motion for a required finding of not guilty. J.A. 74. The court agreed with that suggestion, ruled that it would deny the motion "at this point," and submitted the charge to the jury. J.A. 74, 76, 77-79.

The following day, while the jury's deliberations were ongoing, petitioner's counsel asked the court to reconsider its decision to submit the firearm charge to the jury. J.A. 81. The court took the matter under advisement. J.A. 89. On the next day of trial, the court ruled that "the decision that I rendered, which denied the motion for a required finding of not guilty, will stand." J.A. 92. The jury found petitioner guilty on all

counts submitted to it, including the firearm charge. J.A. 93-95.

b. Petitioner moved for a new trial, arguing, *inter alia*, that the trial court was barred by the Double Jeopardy Clause from withdrawing its initial ruling that the evidence on the firearm charge was insufficient as a matter of law. J.A. 107-109. The court rejected that argument, reasoning that the circumstances were "analogous to a situation where a jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal." J.A. 109. The court explained that the "erroneous allowance of the motion for a required finding of not guilty was corrected before closing arguments, and [petitioner's] counsel had the option to seek a re-opening of the evidence" but "did not do so." *Ibid.* The court further found that petitioner "suffered no prejudice by the court's 'reversal' of its allowance of a required finding of not guilty." J.A. 109-110 n.2.

3. The Appeals Court of Massachusetts affirmed. *Smith*, 788 N.E.2d at 977. The court "conclud[ed] that double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding." *Id.* at 982.

The court also rejected petitioner's argument that the trial court's reconsideration infringed the requirement under Massachusetts law that, when a motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, the trial court must resolve the motion at that time. 788 N.E.2d at 982. The Appeals Court explained that the requirement did not "preclude[] a judge from correcting a ruling" at a later time. *Id.* at 983. The court reasoned, in addition, that the purpose of the requirement had been "honored" because petitioner "has not suggested that the allowance of the motion affected his trial strategy with regard to

the other charges," the "Commonwealth did not introduce any additional evidence," and petitioner "was provided the opportunity to reopen his case." *Ibid.* The court further determined that petitioner "was not otherwise prejudiced by the ruling. The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments." *Ibid.*

SUMMARY OF ARGUMENT

A trial court may reconsider a mid-trial ruling that the evidence presented by the prosecution is insufficient as a matter of law to establish guilt, because the court's interlocutory decision does not constitute a final judgment of acquittal within the meaning of the Double Jeopardy Clause. Under the Double Jeopardy Clause, a final judgment of acquittal has a special status: once there is a final judgment acquitting the defendant based on a finding that the evidence is insufficient to sustain a guilty verdict, the defendant may not be subjected to a new trial or to additional fact-finding proceedings on the charge. Accordingly, the prosecution may not appeal the grant of an acquittal when reversal would necessitate such proceedings. *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986).

Although *Smalis* bars an appeal from the grant of an acquittal at the completion of the prosecution's evidence, the trial court's reconsideration of its own ruling, as occurred in this case, raises distinct issues. A presupposition of appellate review—the context at issue in *Smalis*—is that the trial court has reached a definitive resolution in favor of acquittal. Any further proceedings on the charge thus could occur only as a consequence of the reviewing court's direction.

While the case remains in the trial court, in contrast, the settled rule is that the court possesses an inherent

authority to reconsider and correct its interlocutory rulings. That rule reflects the recognition that, in the highly fluid context of an ongoing trial, a trial court will often be required to render interlocutory rulings without the benefit of adequate deliberation. Barring the court from reconsidering its rulings would disserve the interest in administering justice. Because a trial court's interlocutory ruling granting an acquittal is subject to an inherent authority to reconsider, the prohibition against post-acquittal trial proceedings recognized in *Smalis* is inapplicable.

A trial court's reconsideration of its grant of an acquittal at the close of the prosecution's evidence does not offend double jeopardy values. Because reinstatement of the charge would merely lead to completion of the initial trial, the prosecution would have no opportunity to improve its case or wear down the defendant by initiating a second trial. For the same reason, the defendant would retain his right to resolution of the charges against him by the initial tribunal—jury or judge—before which jeopardy has attached. Moreover, the burdens on the defendant from continuing the trial to completion are no greater than if the trial court had reserved ruling on the motion for acquittal.

Prohibiting a trial court from reconsidering its erroneous grant of an acquittal would compromise the societal interest in achieving just outcomes and affording the prosecution one full and fair opportunity to obtain a conviction. And it would compromise those interests in a manner not presented by the bar against appeal recognized in *Smalis*: Barring a trial court from reconsidering its erroneous grant of an acquittal would allow a defendant to retain the benefit of an acquittal even though *no* court—including that one that initially awarded it—believes it to be justified. There is no

warrant for extending holding of *Smalis* to those circumstances and granting the defendant a windfall to which no court believes him entitled.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A TRIAL COURT FROM RECONSIDERING A RULING GRANTING A MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE

Although this Court has held that a trial court's grant of a motion for judgment of acquittal at the close of the prosecution's case may not be reviewed in an interlocutory appeal, *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), this case involves reconsideration of such a ruling by the trial court itself, not reversal by an appellate court. Those two contexts are distinct from the perspective of the Double Jeopardy Clause.

As the Court has explained, "the language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken. The word itself has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975) (citation omitted); see Peter Westen & Richard Drubel, *Toward A General Theory Of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 137-138 ("For purposes of double jeopardy, an acquittal is a conclusory term used to describe rulings possessing the quality of finality."). A trial court's reconsideration—and correction—of an erroneous, mid-trial grant of an acquittal does not infringe the Double Jeopardy Clause.

A. The Grant Of A Motion For Acquittal May Not Be Appealed When Reversal Would Necessitate Further Trial Proceedings On The Charge

1. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957). Although "the prohibition against multiple trials is the 'controlling constitutional principle,'" *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) (quoting *United States* v. *Wilson*, 420 U.S. 332, 346 (1975)), there is no absolute prohibition against a retrial when the initial trial ends either in a conviction or in the declaration of a mistrial, see *id.* at 130-133. But the "law attaches particular significance to an acquittal," "whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict." *United States* v. *Scott*, 437 U.S. 82, 91 (1978); see *DiFrancesco*, 449 U.S. at 129-130.

An acquittal, whether the product of a jury verdict of not guilty or a judicial determination that the evidence of guilt is insufficient as a matter of law, affords absolute protection against a new trial for the same offense. See *Scott*, 437 U.S. at 91; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571-576 (1977). The "Constitution conclusively presumes that a second trial would be unfair" following an acquittal, and the "defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Because an acquittal forecloses a second trial, double jeopardy principles also preclude any appeal of an acquittal when reversal would require a new trial. See

Scott, 437 U.S. at 91; *Martin Linen Supply*, 430 U.S. at 570-571.

The Court has recognized an exception to the bar against appeal of an acquittal when the trial court grants a judgment of acquittal after the jury has returned a verdict of guilty: an appeal by the prosecution is allowed in that situation because reversal would entail reinstatement of the jury verdict rather than commencement of a new trial. See *Scott*, 437 U.S. at 91 & n.7; *Martin Linen Supply*, 430 U.S. at 569-570; *Wilson*, 420 U.S. at 335-336, 342-345, 352-353.

2. In *Smalis* v. *Pennsylvania*, this Court held that the "Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" 476 U.S. at 145-146 (quoting *Martin Linen Supply*, 430 U.S. at 570). The trial court in *Smalis* ruled at the close of the prosecution's case that the evidence was insufficient as a matter of law on certain of the charges. *Id.* at 141. The court then stayed completion of the trial on the remaining charges pending a mid-trial appeal by the prosecution of the court's acquittal ruling. *Ibid.* That highly anomalous procedure was possible because the case was tried to the bench rather than a jury.[1]

[1] The Pennsylvania Superior Court concluded that the trial court's decision to allow a mid-trial appeal was "not recommended," explaining that, "[a]fter a criminal trial has been commenced, it should not be delayed by piecemeal appeals from orders which do not terminate the proceedings finally." *Commonwealth* v. *Smalis*, 480 A.2d 1046, 1048 n.1 (1984). Cf. *DiBella* v. *United States*, 369 U.S. 121, 126 (1962) ("the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law").

The Commonwealth argued that its mid-trial appeal was permissible because reversal of the trial court's acquittal order would lead only to resumption of the initial trial rather than commencement of a new trial. 476 U.S. at 145-146. This Court disagreed, holding that the appeal of an acquittal is barred by the Double Jeopardy Clause when reversal would lead to further trial proceedings, even if not an entirely new trial. *Id.* at 146; see *Finch* v. *United States*, 433 U.S. 676 (1977) (holding that finding of not guilty based on stipulated facts is not subject to appeal notwithstanding that reversal would not require additional evidentiary proceedings).

Petitioner reads *Smalis* to establish that the grant of a motion for judgment of acquittal cannot be reconsidered by the trial court consistent with the Double Jeopardy Clause. Pet. Br. 24, 25-27. Petitioner reasons (Br. 24) that "jeopardy irrevocably terminates" upon such a ruling, because any reconsideration of the ruling by the trial court—like the mid-trial appeal in *Smalis*—"would translate into further proceedings of some sort, devoted to the resolution of factual issues" on the charge. 476 U.S. at 146 (internal quotation marks omitted). That argument overlooks the distinction between reconsideration of an initial ruling by the trial court itself and reversal of the ruling by a separate tribunal on appeal.

B. The Double Jeopardy Bar Against Appeal Of A Trial Court's Grant Of An Acquittal Does Not Diminish The Court's Authority To Reconsider And Correct Its Own Ruling

A "trial court's ruling in favor of the defendant is an acquittal only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977) (citation omitted); see *Scott*, 437 U.S. at 97; *Martin Linen Supply*, 430 U.S. at 571. The prohibition against "postacquittal factfinding proceedings" recognized in *Smalis*, 476 U.S. at 145, thus comes into play only if the trial court has "actually" reached its "resolution" of "the factual elements of the offense charged," *Lee*, 432 U.S. at 30 n.8. See *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (emphasizing the need for a "resolution" in order to trigger the double jeopardy bar against further trial proceedings). An appeal necessarily implicates the prohibition against post-acquittal trial proceedings, see *Smalis*, 476 U.S. at 145-146, because an appeal presupposes that the trial court has reached its resolution on the charge. When a trial court reconsiders its own initial decision to grant a motion for judgment of acquittal, by contrast, the court by definition has not reached its resolution—the very purpose of the court's reconsideration is to determine what resolution it will reach.

1. *A trial court possesses inherent authority to reconsider a mid-trial ruling granting a motion for acquittal*

a. It has long been settled that trial courts possess an inherent authority to reconsider and correct their interlocutory rulings, and all rulings before the final decree is entered remain inherently interlocutory. See, *e.g.*, *John Simmons Co.* v. *Grier Bros.*, 258 U.S. 82, 88

(1922) ("If it be only interlocutory, the court at any time before final decree may modify or rescind it."). That authority rests on the recognition that the trial context is highly fluid and frequently compels the court to rule without the benefit of adequate deliberation; and the interests of justice therefore would not be served by precluding a court from reconsidering its interlocutory rulings. See 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478.1 (2d ed. 2002) ("All too often, * * * a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment. Far too many things can go wrong, particularly with rulings made while the facts are still undeveloped or with decisions made under the pressures of time and docket.").

The basic power of a trial court to reconsider its interlocutory rulings exists in criminal cases as well as civil cases. See, *e.g.*, *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.), cert. denied, 515 U.S. 1151 (1995); *United States* v. *LoRusso*, 695 F.2d 45, 52-53 (2d Cir. 1982) ("district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment, whether they be oral * * * or written") (citations omitted), cert. denied, 460 U.S. 1070 (1983); *United States* v. *Jerry*, 487 F.2d 600, 605 (3d Cir. 1973) ("whether the case * * * be civil or criminal," as "long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so"). As a result, a trial court's "grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment." *Washington*, 48 F.3d at 79 (quoting *LoRusso*, 695 F.2d at 52-53); see *United States* v. *Baggett*, 251 F.3d 1087,

1095 (6th Cir. 2001) (explaining that "an oral grant of a Rule 29 motion outside of the jury's presence does not terminate jeopardy, inasmuch as a court is free to change its mind prior to the entry of judgment"), cert. denied, 534 U.S. 1167 (2002).

Not only does a trial court possess an inherent authority to reconsider its interlocutory grant of an acquittal, but a request by the prosecution for the court to reconsider its ruling—or an indication by the court *sua sponte* that it may do so—makes clear that the initial ruling may not constitute its resolution of the charge. Cf. *United States* v. *Ibarra*, 502 U.S. 1, 6 (1991) (observing that "a motion for rehearing in a criminal case * * * renders an otherwise final decision of a district court not final until it decides the petition for rehearing"); *United States* v. *Dieter*, 429 U.S. 6 (1976); *United States* v. *Healy*, 376 U.S. 75 (1964).[2] A request to reconsider the mid-trial grant of an acquittal or a suggestion to that effect by the court explicitly renders the matter unresolved.

b. An appeal from a trial court's grant of an acquittal presents the reverse situation, in which the trial court's ruling by nature represents its final resolution of the charge. An appeal from the grant of a motion for acquittal—whether an interlocutory appeal, see *Smalis*, 476 U.S. at 145-146, or an appeal from a final judgment following discharge of the jury, see *Martin Linen Supply*, 430 U.S. at 570—presupposes that the trial court has reached its resolution.

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[2] This Court's decisions in *Ibarra*, *Dieter*, and *Healy*, address the implications of a motion for rehearing for the appealability of a judgment in a federal criminal case. Those decisions hold that a motion for rehearing has the effect of rendering the court's judgment non-final and thus non-appealable, so that the time for taking an appeal begins to run only after the court rules on the motion.

That is because appellate review of the trial court's grant of an acquittal generally leaves the court powerless to alter the ruling of its own accord. See *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (The "filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). If a trial court's grant of an acquittal were subject to appellate review, any further proceedings on the charge could ensue only from direction by the appellate court, not reconsideration by the trial court. Whether the ruling were affirmed or reversed, the trial court would be bound to act in accordance with the appellate determination. Moreover, the government's taking of an appeal indicates the government's belief that the trial court has completed its resolution of the charge. Because an appeal necessarily presumes that the trial court has arrived at its final resolution, appeal of a mid-trial ruling granting a judgment of acquittal squarely implicates the double jeopardy bar against post-acquittal fact-finding proceedings. See *Smalis*, 476 U.S. at 145-146.

2. A trial court's reconsideration of its mid-trial grant of an acquittal does not place the defendant twice in jeopardy

When considered against the backdrop of the settled rule that trial courts have inherent authority to reconsider interlocutory rulings, a trial court's correction of a mid-trial ruling granting an acquittal does not place the defendant "twice" in jeopardy within the meaning of the Double Jeopardy Clause. Rather, the proceedings, including any potential reconsideration of the ruling and reinstatement of the charge, are part of a single, continuing "jeopardy."

That conclusion is supported by this Court's decision in *Swisher* v. *Brady*, 438 U.S. 204 (1978). *Swisher* involved a two-stage system for juvenile court adjudications in Maryland under which a court master, after receiving the evidence, reported his proposed findings, conclusions, recommendations, and orders to the juvenile court. Although the master's proposals were not considered final action until acted on by the juvenile court, the court could simply adopt (or modify or reject) the master's proposed rulings, the court was limited to the record before the master absent the parties' consent to supplement the record, and the master served his report on the State and the juvenile who could then file exceptions to the report in the juvenile court. *Id.* at 210-211, 215-216.

A class of juveniles contended that, in cases in which the master concludes that the State has failed to establish guilt beyond a reasonable doubt and reports that conclusion in his proposed findings and orders to the juvenile court, the juvenile court is barred by double jeopardy principles from considering the State's exceptions to the master's proposed findings. This Court rejected that argument and held that a juvenile is not put twice in jeopardy by the court's review of the master's conclusions. Instead, he is "subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215; see *DiFrancesco*, 449 U.S. at 140-141 (explaining that *Swisher* involved a "continuing single process"). See also *Lydon*, 466 U.S. at 309 (treating two-stage proceeding as one continuous proceeding for purposes of Double Jeopardy Clause).

The trial court's reconsideration in this case of its initial ruling granting an acquittal manifestly was part of a "continuing single process." *DiFrancesco*, 449 U.S.

at 141. Just as the juvenile court in *Swisher* had authority to adopt, modify, or reject the master's findings and orders recommending an acquittal, the background rule is that a trial court possesses inherent authority to modify or withdraw its own interlocutory ruling in favor of an acquittal.[3] The State's filing of exceptions to the master's findings in favor of an acquittal in *Swisher* is comparable to the prosecution's seeking reconsideration of a trial court's interlocutory grant of an acquittal. Unlike an appeal, which transfers the proceedings to a different court for review, reconsideration by the trial court continues a "single proceeding" before a single tribunal. *Swisher*, 438 U.S. at 215; see *id.* at 217-218 & n.15 (distinguishing *United States* v. *Jenkins*, 420 U.S. 358 (1975), and *Kepner* v. *United States*, 195 U.S. 100 (1904), in part on ground that both decisions involved "appellate review").

It is notable in this regard that, in both *Smalis* and *Sanabria* v. *United States*, 437 U.S. 54 (1978)—decisions on which petitioner substantially relies (Pet. Br. 19, 24)—the trial courts had entertained motions to reconsider the mid-trial grant of a motion for acquittal, ultimately concluding that the initial ruling was correct. See *Sanabria*, 437 U.S. at 59-60; *Smalis*, 480 A.2d at 1048 n.2. Although this Court concluded in both cases that the Double Jeopardy Clause barred any appeal from the trial court's mid-trial grant of an acquittal, there was no suggestion in either case that double

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[3] See *United States* v. *Lane*, 768 F.2d 834, 841 (7th Cir.) (explaining that the "law of Illinois is that until the court enters the sentence, [the] proceedings have not come to a conclusion," and that, because "the judge may change his mind," "[w]hat the judge says after trial in Illinois is less 'final' than the master's recommendation in *Swisher*"), cert. denied, 474 U.S. 951 (1985).

jeopardy barred the trial courts' reconsideration of their own mid-trial rulings.

C. There Is No Warrant For Extending The Holding Of *Smalis* To Prohibit A Trial Court From Correcting Its Erroneous, Mid-Trial Grant Of An Acquittal

1. *Barring reconsideration of an erroneous grant of acquittal would compromise the interest in achieving just outcomes without advancing the values served by the Double Jeopardy Clause*

When defining the contours of double jeopardy protections, this Court has balanced the interests of defendants "against the public interest in insuring that justice is meted out to offenders." *Scott*, 437 U.S. at 92; see *Arizona* v. *Washington*, 434 U.S. at 503 n.11 (observing that interests of defendants promoted by Clause are sometimes "subordinate to a larger interest in having the trial end in a just judgment"); *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). That balance dictates that the Court should not extend the bar against interlocutory appeal of a mid-trial acquittal to the distinct context of reconsideration of such a ruling by the trial court itself.

a. The Court's double jeopardy decisions recognize the "public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington*, 434 U.S. at 505; see *id.* at 509 (noting the interest in "in giving the prosecution one complete opportunity to convict those who have violated its laws"); accord *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). Precluding a trial court from reconsidering its grant of an acquittal would frustrate that interest in a manner that the prohibition against appeal of an acquittal does not: barring reconsideration by the trial

court itself would permit a defendant who may be guilty to obtain the benefit of an acquittal even though *no* court—not even the one that initially granted him an acquittal—believes him entitled to it. Because the prosecution would be barred from going forward even though no tribunal believes that the evidence is insufficient to convict, the prosecution would not be afforded "one full and fair opportunity" to establish the defendant's guilt. *Arizona* v. *Washington*, 434 U.S. at 505.

The prosecution's "one full and fair opportunity" incorporates the background rule that trial courts have inherent authority to reconsider their interlocutory rulings until the proceedings are completed. That rule is grounded in the recognition that the demands of trial frequently result in erroneous interlocutory rulings made without the benefit of adequate deliberation. This case is illustrative. Although the Commonwealth, when the trial court initially raised the issue, correctly argued that the barrel length of the firearm possessed by petitioner could be inferred from the testimony that the firearm was a pistol, see J.A. 21, the court ruled that the evidence was insufficient, stating "I don't think" the jury can draw such an inference, J.A. 21-22. That same morning, during the next break in the proceedings, the Commonwealth brought to the court's attention an appellate decision that demonstrated the correctness of the Commonwealth's position, whereupon the court withdrew its previous ruling. J.A. 71-74. Barring a trial court from correcting its initial ruling in such circumstances—particularly when the prosecution has correctly interpreted the law from the outset—would deny the prosecution a full and fair opportunity to obtain a conviction.[4]

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[4] Petitioner's approach would treat an erroneous grant of an acquittal as irrevocable even if the ruling were issued before the

b. The decision in *Smalis* rested on concerns that permitting an appeal "would frustrate the interest of the accused in having an end to the proceedings against him" after he has convinced the trial court that he is entitled to be acquitted as a matter of law. 476 U.S. at 145. Nothing in the values underlying the Double Jeopardy Clause requires extending that holding to circumstances in which even the trial court itself recognizes that its ruling was incorrect and that the charge should go to the jury.

For instance, when a court reconsiders its grant of an acquittal at the close of the prosecution's case, it does not afford "the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978). The prosecution has completed presentation of its case and seeks only to submit the charge to the jury.[5] In addition, because reconsideration only results

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prosecution has finished presenting its case, see *Fong Foo*, 369 U.S. at 141-142, a point at which the prosecution plainly has not been afforded one full opportunity to establish guilt.

[5] There is no merit to the argument of petitioner's amicus (NACDL Br. 7-9) that the Commonwealth was afforded a "forbidden 'second crack'" (*Swisher*, 438 U.S. at 216) when it brought legal authority to the trial court's attention demonstrating that the court's grant of an acquittal was incorrect. The concern under the Double Jeopardy Clause is with affording the prosecution "another opportunity to supply *evidence*," not legal argument. *Burks*, 437 U.S. at 11 (emphasis added). Moreover, even with respect to the submission of evidence, a "trial court has broad discretion to allow the prosecution to reopen to establish an element of an offense after the defendant has moved for judgment of acquittal." *United States* v. *Rouse*, 111 F.3d 561, 573 (8th Cir.), cert. denied, 522 U.S. 905 (1997); see *United States* v. *Leslie*, 103 F.3d 1093, 1104 (2d Cir.) ("In any event, even after a defendant moves * * * for acquittal, a district judge retains wide discretion to allow the government to re-open its case to correct errors 'or some other compelling circumstance . . . justifies a reopening and no substantial prejudice will occur.'") (quoting *United States* v. *Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980)), cert. denied, 520 U.S. 1220 (1997).

in continuation of the trial before the initial finder of fact, it does not infringe the defendant's "valued right to have [his] trial concluded by a particular tribunal." *Arizona* v. *Washington*, 434 U.S. at 505; see *Swisher*, 438 U.S. at 216. For the same reason, reconsideration does not "enhanc[e] the risk that an innocent defendant may be convicted" as a consequence of undergoing a series of prosecutions before a succession of fact-finders. *Swisher*, 438 U.S. at 216 (quoting *Arizona* v. *Washington*, 434 U.S. at 504); see *DiFrancesco*, 449 U.S. at 130.

Finally, when a trial court, upon reconsideration, permits the trial to proceed to completion on the reinstated charge, it does not "unfairly subject[] the defendant to the embarrassment, expense, and ordeal of a second trial." *Swisher*, 438 U.S. at 216 (citing *Green*, 355 U.S. at 184). The burdens on the defendant are no different than if the court had initially denied an acquittal or had reserved its ruling. Although the ruling might give rise to a temporary belief by the defendant that he is free on the charge, that sort of expectation does not fall within the protections of the Double Jeopardy Clause. See *United States* v. *Baker*, 419 F.2d 83, 89 (2d Cir. 1969) (explaining that, although the defendant's "hopes were first raised, then quickly lowered" when the court reconsidered its grant of an acquittal, "so ephemeral and insubstantial an injury" raises no double jeopardy violation), cert. denied, 397 U.S. (1970); cf. *Wilson*, 420 U.S. at 345 ("Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defen-

dant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.").

2. *The approach pressed by petitioner is inconsistent with the background rule on interlocutory rulings and is unworkable*

a. Under petitioner's proposed approach, a mid-trial ruling granting a motion for acquittal would be irrevocable. Petitioner allows, however, that if the court were to express its ruling in a manner that expressly leaves open the possibility of further consideration, the ruling would not merit treatment under the Double Jeopardy Clause as an irrevocable acquittal. See Pet. Br. 21.

Petitioner's effort to distinguish between definitive and equivocal mid-trial rulings is misguided. As a consequence of the settled background rules governing interlocutory orders, *all* mid-trial rulings granting an acquittal—no matter how definitively expressed at the time—are implicitly subject to the inherent authority of courts to reconsider them. Massachusetts abides by the universal background rule. See *Smith*, 788 N.E.2d at 983. There is no reason a different rule should apply when a court makes explicit what is always implicit. Rather, rulings that remain interlocutory—whether because the court says so explicitly or because the proceedings are ongoing—should not be given the treatment of a final judgment of acquittal under the Double Jeopardy Clause.[6]

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[6] As the Court of Appeals for the Seventh Circuit has explained:

> Suppose a federal district judge, after a bench trial, said to the defendant: "In light of the evidence of mitigation I have heard, I am inclined to find you not guilty. But I must consider my decision with greater care and read the pertinent cases. Your case is taken under advisement." If the judge later entered a judgment of guilt, there could be no serious argument that the judgment violated the Double Jeopardy Clause. Under the law of Illinois, what the trial judge did has the same effect as this statement of a district judge.

Lane, 768 F.2d at 841; see *id.* at 842 ("The Double Jeopardy Clause does not prevent Illinois from giving its trial judges time to rethink ill-considered statements they may issue immediately after hearing the evidence.").

Because the trial court's ruling inherently was subject to reconsideration, any measures taken to formalize it—such as endorsing the motion by the clerk or registering the ruling on the docket (Pet. Br. 21)—should be largely immaterial. Memorializing the ruling does not alter its essential character. Cf. *DiFrancesco*, 449 U.S. at 142 ("The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action.").

b. Petitioner's distinction between definitive and equivocal rulings not only is unsound as a legal matter, but it also is largely unworkable as a practical matter. When a defendant moves for a judgment of acquittal at the close of the prosecution's case, the trial court, in the interests of avoiding an extended delay before resuming the trial, frequently will rule on the motion orally. The determination whether the court definitively granted an acquittal thus would often turn on a parsing of the judge's extemporaneous remarks from the bench. The inquiry would entail the drawing of fine distinctions based on the exact words used by the trial judge and the extent to which statements suggesting a

decision to grant an acquittal are sufficiently distinct from remarks indicating equivocation.[7]

As one court has explained, "[m]uch of the determination [would] come[] down to after-the-fact analysis

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[7] See, *e.g.*, *Price* v. *Vincent*, 538 U.S. 634, 637 (2003) (trial judge stated that "my impression at this time is that there's not been shown premeditation or planning * * * [t]hat what we have at the very best is Second Degree Murder," and judge later agreed to hear reargument on the issue); *Baggett*, 251 F.3d at 1091-1092 (trial judge initially stated that "I don't believe that the proof has made out a case of interstate domestic violence," agreed immediately thereafter to "hold [its ruling] in abeyance," but then later stated that it had "granted the motion" for a judgment of acquittal); *United States* v. *Byrne*, 203 F.3d 671, 674 (9th Cir. 2000) (court first stated that it was "granting the defendant's motion under Rule 29," but then "immediately after that announcement" was asked to reconsider its ruling, which it ultimately agreed to do, observing, "I have made up my mind, unless I can be convinced otherwise"), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88, 132-134 (2d Cir.) (court orally grants motion for acquittal, indicates on the next day of trial that it is willing to reconsider the ruling, and on the following day reinstates the charges), cert. denied, 528 U.S. 982 (1999); *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.) (court "orally granted [the] motion for acquittal" on one count at the close of the government's case, resumed the trial on the remaining charge, but then reversed its ruling during an adjournment for lunch after one defense witness had begun testifying), cert. denied, 515 U.S. 1151 (1995); *People* v. *Williams*, 721 N.E.2d 524, 526 (Ill. 1999) (judge states that "I'm going to grant the motion for a directed finding and finding of not guilty," but then says to the prosecutor later in the course of the same colloquy, "if you want to provide me with something, I'll be happy to look at it if you want me to hold that in abeyance but I don't think that it's established"); *State* v. *Collins*, 771 P.2d 350, 351 (Wash. 1989) (court grants acquittal but then, "[m]inutes later," prosecutor offers contrary authority, prompting judge to "reverse[] his first ruling"); *Lowe* v. *State*, 744 P.2d 856, 856-857 (Kan. 1987) (court grants acquittal *sua sponte* but then reverses its ruling the following morning before trial resumes).

of subtle distinctions preserved in the record of the proceedings. The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork." *State* v. *Collins*, 771 P.2d 350, 353 (Wash. 1989). Distinguishing a situation involving the grant of an acquittal followed promptly by reconsideration from one involving equivocation all along would prove especially difficult because "[i]ndividual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result." *Ibid.* This Court, when construing the Double Jeopardy Clause, "ha[s] disparaged" the sort of "'rigid, mechanical' rules" contemplated by petitioner's approach. *Serfass*, 420 U.S. at 390 (citation omitted). The sounder approach would give effect to a trial court's inherent authority to reconsider its interlocutory rulings, a rule born of the recognition that the trial context is highly fluid and that precluding reconsideration would disserve the interest in achieving just outcomes.

3. *Petitioner's arguments against permitting trial courts to correct an erroneous mid-trial acquittal are unpersuasive*

a. Petitioner and his amicus argue (Pet. Br. 26-28; NACDL Br. 3-7) that allowing reconsideration of mid-trial acquittals would produce anomalous outcomes, because reconsideration, as a practical matter, would be available more frequently in cases in which the jury remains impaneled to consider any additional charges against the defendant or co-defendants. In petitioner's view, the likelihood that a mid-trial acquittal would be subject to reconsideration should not turn on the "fortuity" (Pet. Br. 28) of whether the case involves multiple charges or defendants and the jury thus remains impaneled. Petitioner's argument lacks merit.

That a rule permitting reconsideration of an erroneous ruling on the sufficiency of the evidence may incidentally have varying practical implications in different factual circumstances does not call into question the legal soundness of the rule under the Double Jeopardy Clause. There is no cognizable interest under the Double Jeopardy Clause in enabling a defendant to convert an acquittal that the rendering court recognizes was legally erroneous into an irrevocable windfall, when there remains a practical means for the court to correct its own error. Because no defendant has a protected interest in precluding a judge from correcting his own erroneous, interlocutory acquittal, petitioner errs in arguing that permitting reconsideration in a class of cases is anomalous because similar errors in a different class of cases would be more difficult to correct as a practical matter.

It is petitioner's approach that would give rise to anomalous results. Under that approach, whether the grant of an acquittal is immune from reconsideration would turn on such factors as the administrative steps that may have been taken by the court or the clerk to memorialize the ruling, the extent to which the ruling is expressed definitively or is instead accompanied by remarks suggesting equivocation, and the amount of time separating any such equivocal statements from announcement of the ruling or actions formalizing the ruling. The ability of a trial court to correct an erroneous acquittal should not turn on the formal happenstance of whether the clerk registers the ruling on the docket before the court indicates an inclination to reconsider it. Cf. *Martin Linen Supply*, 430 U.S. at 571 ("[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action.").

b. Petitioner argues for "conclusively presuming unfairness" (Pet. Br. 35) when a trial court revisits its grant of an acquittal. There is no warrant for that across-the-board presumption. Reconsideration of an erroneous grant of acquittal does not invariably impair the defendant's ability to present a defense on the reinstated charge or any other charges.[8] The existence or extent of any such prejudice would depend on the circumstances of a particular case, and would more squarely implicate the Due Process Clause than the Double Jeopardy Clause.

Although petitioner argues that the trial court's reconsideration in this case prejudiced his presentation of his defense, Pet. Br. 34-37, the trial court found that petitioner "had the option to seek a re-opening of the evidence" and had "suffered no prejudice" from the court's withdrawal of its initial ruling, J.A. 109-110 & n.2. The Appeals Court similarly determined that petitioner could have reopened the evidence on the reinstated firearm charge, that he made no suggestion that the reconsideration adversely affected his trial strategy on the other charges, and that he "was not otherwise prejudiced." *Smith*, 788 N.E.2d at 982.

c. Finally, prohibiting trial courts from reconsidering mid-trial acquittals is unlikely to redound to the

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[8] For instance, in *Rahman*, 189 F.3d at 132- 134, the trial court definitively stated to counsel that it had ruled on the defendant's motion for acquittal and was granting it, the government moved for reconsideration on the next day of trial, and the court indicated in response that it would reconsider its earlier ruling. The court of appeals explained that the defendant had "suffered no prejudice of any kind; he did not lose any opportunity to offer evidence, or commit himself to any course of defense that needed reassessment in light of the changed ruling." *Id.* at 134. In addition, "[n]one of [the] proceedings involving the defendant's motion took place in the presence of the jury." *Ibid.*

benefit of defendants as a systemic matter. There is no requirement to afford defendants an opportunity to obtain a judgment of acquittal from the trial court before submission of the case to the jury. If trial courts are barred from reconsidering mid-trial acquittal motions, they may be inclined to deny the motions (or at least defer their decision) to avoid the prospect of issuing an irrevocable ruling that would forbid further reflection and permanently foreclose prosecution of the charge. And States may be less willing to allow courts to grant motions for an acquittal before a jury verdict if there is a risk that a judge's first impression may prevent the charge from going to the jury, even if the judge soon after recognizes his or her error. See *Monge* v. *California*, 524 U.S. 721, 734 (1998) (denying double jeopardy protection to sentencing determinations in non-capital sentencing proceedings in part because doing so might diminish a State's willingness to provide procedural protections in such proceedings).

CONCLUSION

The judgment of the Appeals Court of Massachusetts should be affirmed.

Respectfully submitted.

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